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IN THE

Supreme Court of the United States

October Term, 1952.

No. **672**.

THE BIEVER MOTOR CAR COMPANY,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

HERBERT L. EMANUELSON,
JAMES G. AUSTIN,
RICHARD J. BOOKHOUT,
STERLING P. HARRINGTON,
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THE REPORTER COMPANY, INC., Walton, N. Y.—1953

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES:

Biever Motor Car Company, the plaintiff below, prays that a writ of certiorari be issued to review the decision of the Court of Appeals for the Second Circuit affirming the judgment of the District Court for the District of Connecticut granting defendant's motion for summary judgment and dismissing petitioner's complaint on the merits.

Opinions Below.

The opinion of the United States District Court for the District of Connecticut (R. 60) is not reported.

The opinion of the Court of Appeals (R. 77) is reported in 199 F. (2d) 759.

Jurisdiction.

The jurisdiction of this Court is invoked under U. S. C. Title 28, Section 1254 (1) (62 Stat. 928)

The decision to be reviewed was rendered by the Court of Appeals for the Second Circuit on December 1, 1952 (R. 77). An order of Hon. Fred M. Vinson, Chief Justice of the United States, made March 2, 1953, and entered in this Court on March 2, 1953, extended the time of petitioner to file its petition for a writ of certiorari to and including March 23, 1953 (R. 79). This petition is being filed in conformity with, and within the time limited by, the provisions of Rule 38 of the Rules of this Court and U. S. C., Title 28, Section 2101 (c) (62 Stat. 961, 63 Stat. 104) as thereby extended.

Questions Presented.

1. Whether the contract between the parties may be terminated by the manufacturer in the absence of good faith, wrongfully, maliciously and without cause?

2. Whether a dealer has a cause of action for breach of the contract where the purported right of termination is exercised to accomplish an illegal purpose?

3. Whether summary judgment should be adopted to decide issues of far flung import, on which the economic life of a large section of an industry depends?

Statutes Involved.

So far as material subdivisions (b) and (c) of Rule 56 of the Rules of Civil Procedure in the United States District Courts provide as follows:

"Rule 56. SUMMARY JUDGMENT

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

Statement of the Matter Involved.

The complaint alleged, and the defendant's motion for summary judgment (R. 27) admits, the pertinent facts:

On August 29, 1944, the plaintiff, a Connecticut corporation, and the defendant, a Delaware corporation, entered into a contract in writing, consisting of two documents ("Exhibit A" R. 7 and "Exhibit B" R. 23) granting the plaintiff an exclusive agency for the sale of Chrysler cars.

The defendant, in the absence of good faith, wrongfully, maliciously and without cause, attempted to abrogate by unilateral action its contract with the plaintiff and broke the contract by failing to deliver cars. The plaintiff's damages were computed at $965,637, Exhibit 3 (R. 39), being loss of profits on cars it estimated should have been delivered from the time of breach to and including the end of the second following year.

The District Court held that the defendant was entitled to terminate the contract with the plaintiff without cause and granted judgment to the defendant dismissing the complaint on its merits and entered its judgment accordingly (R. 70). In so doing, the Court necessarily decided that so long as written notice was sent and received it mattered not that such notice was sent "in the absence of good faith, wrongfully, maliciously and without cause" as stated in the complaint.

On December 1, 1952, the Court of Appeals filed its opinion affirming the District Court "on the authority of *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.* (C. A. 2d), 116 F. 2d 675" (R. 77). Judgment of affirmance was entered the same day (R. 78).

Specifications of Errors to be Urged.

The Courts below erred in granting summary judgment.

Reasons for Granting the Writ.

The facts alleged in the complaint are admitted by the motion for summary judgment. The defendant therefore cancelled the contract "in the absence of good faith, wrongfully, maliciously, and without cause," thereby breaching the contract.

The motion of the defendant was under Rule 56 (c) of the Rules of Federal Practice.

1. The decision determines an important question of local law in a way probably in conflict with applicable local decisions.

The contract involved in this action provides that it "be interpreted and construed according to the laws of the State of Michigan" (R. 20).

The Courts below in granting summary judgment held that the mere giving of notice effectively terminated the contract, and in so doing adopted a construction contrary to leading decisions of the Supreme Court of Michigan, which require that such termination be in good faith.

The leading case in the State of Michigan is *J. R. Watkins Co. v. Rich*, 254 Mich. 82, 235 N. W. 845 (1931). In that case a sales agency contract provided that either of the parties "may terminate this agreement at any time by giving the other party notice thereof in writing by mail." The Supreme Court of Michigan held that the option to terminate must be exercised in good faith stating: "A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith." In its decision the Michigan Court cited *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539 (1918), which held that an early automobile agency contract did involve fancy, taste, and sensibilities, but even so questions of bad faith and fraud in exercising the option to terminate were for the jury to decide.

In *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N. W. 457 (1912), the factory cancelled a dealership under a provision of the contract which provided "that the method of conducting said agency and the detailed care given to each of the Anderson machines which are sold shall be such as will at all times be entirely satisfactory to the Anderson Carriage Company." The Supreme Court of Michigan said that if the "dissatisfaction claimed is shown to be insincere, in bad faith, dishonest, or fraudulently set up as a subterfuge it will be no defense," and a jury question was raised.

Other cases establishing the law of Michigan in similar fashion are *Fuchs v. Standard Thermometer Co.*, 178 Mich. 37, 144 N. W. 484 (1913), *Brusker v. Manistee, etc., R. Co.*, 166 Mich. 330, 130 N. W. 822 (1911).

The Courts below ignored the differences in wording and meaning between the provisions of the Chrysler dealership contract involved in the instant case and the Ford dealer contract involved in an earlier Second Circuit case, *Bushwick-Decatur Motors v. Ford Motor Co.*, 116 F. (2d) 675 (C. C. A. 2, 1940). See 30 F. Supp. 917 for opinion below. In any event, certiorari apparently was not sought in the *Bushwick-Decatur* case (*supra*) which failed to apply the law of Michigan requiring good faith in termination. The reasons set forth in the *Bushwick-Decatur* case (*supra*) to distinguish its facts from Michigan case of *J. R. Watkins v. Rich* (*supra*) were that the Ford contract was expressly made terminable "at the will of either party" whereas the Watkins contract provides only that it might be terminated "at any time"; and that there appeared to be elements of fraud present in the inception of the Watkins contract, but not in the *Bushwick-Decatur* case. Although the *Bushwick-Decatur* case was held controlling of the instant case by the Courts below, in fact the wording of the Chrysler contract more nearly corresponds with the Watkins contract in that the words "at the will of either party" are not included in the termination provisions. So also, under the allegations of the complaint in this action, plaintiff should be permitted to put in his proof as to the circumstances at the inception and purported termination of the contract to show a similar situation as existed in the *Watkins* case.

It is submitted that the Court below in deciding the *Bushwick-Decatur* case varied from the Michigan law by distinguishing the facts; and by summarily disposing of the instant case on the authority of the *Bushwick-*

Decatur case the Court below extends the effect of its earlier decision to a situation involving different facts, and thereby refuses to follow the applicable Michigan law as set forth in *J. R. Watkins v. Rich* (*supra*).

2. The decision of the Court of Appeals is in conflict with decisions of this Court.

The District Court determined the case on the word *desire* in the provision of the contract defining the rights of the parties as to termination of the contract upon notice which reads, "It is also recognized that certain other conditions may arise under which either party may desire to terminate this agreement by giving reasonable notice to the other party" (R. 62).

The decision therefor rests upon the theory that once the desire to cancel is held by the manufacturer, no restriction exists as to its exercise, save that the notice be in the form provided for by the contract.

The Court of Appeals in affirming the decision necessarily affirmed this position which fails to take into consideration those decisions of this Court which stand upon the basis that the right of cancellation, whatever its terms, may not be used to accomplish an illegal purpose.

> *Emich v. General Motors Corp.*, 340 U. S. 558, 95 L. Ed. 535, 71 Sup. Ct. 408.

An examination of the opinion in the Court of Appeals in the criminal portion of the *Emich* case shows that Emich was cancelled in accordance with the terms of the contract. *U. S. v. General Motors Corp.*, 21 F. 2d 376, 396. However, since the cancellation was for an illegal purpose (violation of the Sherman Act) the defendant was not freed from liability because it gave the technical notice provided for in the contract.

In the instant case for all the District Judge could know from the pleadings the plaintiff would be entitled to prove a course of conduct by the defendant which would make applicable the principle on which the *Emich* case and the anti-trust cases are founded. This the District Court and the Court below entirely ignored.

Assuming that the plaintiff could establish by proof that the purported cancellation of the contract was "wrongful" by reason of illegality, the complaint as framed raised a genuine issue of a material fact (Rules of Civil Procedure, Sec. 56 [c]).

It is submitted that the decision below is also in conflict with the interpretation of Rule 56 of the Rules of Civil Procedure of the United States District Courts in the decision of this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 257; 92 L. Ed. 1347, 68 Sup. Ct. 1031, in which the Court said:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or jurisdiction for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice" (at 256-7).

In fact the decision of the Court below goes to such lengths to construe the language of the contract as to termination, i. e., "certain other conditions may arise under which either party may desire to terminate this agreement" (R. 12), to mean "either party may desire" to terminate the contract, that the opinion may for all practical purposes be said to have ruled that there was in fact no contract between the parties. This was for-

merly the position of the manufacturers in this type of case but has given way to the modern view that the instrument is in fact a contract (see 4 Williston, Contracts [Rev. Ed.], Sec. 1027 A [5], pp. 2854-66) to which the District Court gave lip service stating:

> "Although the defendant denied the allegation in the complaint that the agreements between it and Biever constituted a contract, for present purposes it concedes that a contract did in fact exist" (R. 64-65).

The entire construction of the contract by the District Court and affirmed by the Court of Appeals is in contravention of the rule established by this Court in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. 876, which held that the fact that a contract gave a party the right to terminate it in certain contingencies did not give him a right to terminate it arbitrarily.

3. The queston here presented is one of general importance throughout the forty-eight states and has not been, but should be, settled by this Court.

The holding by the Courts below that an automobile dealership contract may be cancelled by the manufacturer "in the absence of good faith, wrongfully, maliciously and without cause," is of extreme importance to the automotive dealers of the country. Under this ruling the manufacturer is to all intents and purposes freed from any restraint on his exercise of the right to terminate the contract regardless of the language used in the contract.

The impact of this decision reaches a large segment of the economy. The United States Census of Business, 1948, shows that in that year there were 779,000 persons

employed in automotive production, while at the same time there were a total of 565,167 persons employed by new vehicle dealers. Better than 80 per cent of the new vehicle production was concentrated in the "Big Three," namely, General Motors, Chrysler and Ford, of which Chrysler was the second largest. The form of Direct Dealer Agreement here involved was uniformly used throughout Chrysler's dealer organization for Chrysler, DeSoto and Dodge dealers, each of whom generally sold the Plymouth also. At the same time, the distribution function was separated into 43,999 separate new vehicle dealer units throughout the country of which this plaintiff was one. These many comparatively small dealer organizations are required to maintain a "satisfactory" place of business, often elaborate and expensive, and to maintain service facilities and personnel, as well as inventories of spare parts. They are dependent upon the continuance of their franchise and their bargaining position is insignificant against that of the manufacturer, especially in times of a sellers' market when a dealership represents a particularly valuable asset. This tremendous disparity in bargaining position, and the possibilities of evil inherent therein, have been recognized as matters of great public interest. F.T.C. Report on the Motor Vehicle Industry (1939), H. R. Doc. No. 468, 76th Cong., 1st Sess. 140-145. See also 63 Harvard L. Rev. 1010, *et seq.* (April, 1950).

The decision of the Court below rather than being a deterrent to the evils inherent in the entire franchise system, gives added opportunities to the manufacturer to coerce the dealers in manners which have heretofore been forbidden.

CONCLUSION.

For these reasons this petition for writ of *certiorari* should be granted.

Respectfully submitted,

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